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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Appln. of: FANEUF
Serial No.: 09/723,868
Filed: November 28, 2000
For: COMBINATION ROPE AND CLIP FOR CULLING FISH
Group: 3644
Examiner: SMITH, KIMBERLY S. DOCKET: FANEUF 00.02

MAIL STOP APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
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TRANSMITTAL LETTER

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In connection with the above-entitled matter, enclosed please find the following:

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2. Credit Card Payment Authorization Form PTO-2038 in the amount of \$165.00 to

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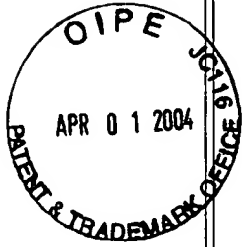
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Respectfully submitted,

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Serial No. 09/723,868
Docket No. FANEUF 00.02
Transmittal Letter submitted with
APPELLANT'S BRIEF ON APPEAL

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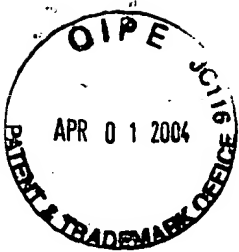
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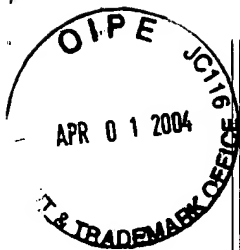
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APPELLANTS' BRIEF ON APPEAL

This Brief is being filed in support of Appellant's Appeal From the Final Rejection by the Examiner, the Notice of which was timely filed under Certificate of Mailing on February 6, 2004.

REAL PARTY IN INTEREST

The Real Party in Interest in this Application is Plasti-Clip Corporation, which has a place of business at 38 Perry Road, Milford, New Hampshire 03055. Plasti-Clip Corporation received an Assignment of all right, title and interest in the Application through an Assignment executed by the inventor, Daniel Faneuf, and by virtue of his employment by Plasti-clip Corporation, on November 27, 2000. The Assignment to Plasti-clip Corporation was submitted to the U.S. Patent and Trademark Office for recordation on November 28, 2000, and was

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recorded in the U.S. Patent and Trademark Office on November 28, 2000 at Reel 011297,
Frame 0140.

RELATED APPEALS AND INTERFERENCES

To the best of the knowledge of the undersigned attorney and Appellant, no other appeals or interferences exist which would affect, or be directly affected by, or have a bearing on the instant Appeal.

STATUS OF THE CLAIMS ON APPEAL

Claims 1, 2, 4, 5, 7, 8, 10-13, 15-17, and 19-22 are pending in the current Application. Claims 1, 2, 4, 5, 7, 8, 10-13, 15-17, and 19-22 stand finally rejected and are on Appeal. The claims on Appeal are set forth in **Appendix A** attached hereto.

STATUS OF THE AMENDMENTS

Appellant's Amendment F under Rule 116 was entered in this case, but was deemed not to place the Application in order for allowance.

BACKGROUND OF THE INVENTION ON APPEAL

During fishing tournaments, a contestant is only allowed to hold a certain number of fish. Thus, when the fisherman has caught the maximum number of fish, the smallest fish must be released and replaced with a larger catch; that is, the fish need to be culled. Over the years, fishermen have developed many methods of quickly identifying the smallest fish during the culling process. The most popular method involves attaching a clip or a hook to the fish with

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some type of marker. The fisherman keeps track of the weight of the fish attached to each marker and thus can easily identify and release the smallest fish when necessary.

The traditional clip or hook attaches to the fish through the fish's gill or fish's mouth by puncturing a hole in the fish. However, the traditional clip or hook has two main disadvantages. First, the hook punctures a hole in the fish and causes harm to the fish. Additionally, the traditional hook or clip may become entangled with other hooks or clips, or may sink.
(Specification, page 1, lines 7-18).

SUMMARY OF THE INVENTION ON APPEAL

The present invention overcomes the aforesaid and other disadvantages of the prior art.

The invention on Appeal is perhaps best understood with reference to Figure 4.

Referring to the specification and Figure 4 of the drawings, reduced below for the convenience of the Board, Figure 4 shows a fish 300 secured to the assembly 200. A fisherman securely holding the rope 204 in his hand 304 holds the assembly 200 vertically. A pair of upwardly extending protrusions 136' and 138' of the clip 100' securely holds the fish 300 by gripping the fish's lip or jaw 302. The force caused by the fisherman pulling on the rope 204 urges a biasing member 116' upward. The upward movement of the biasing member 116' urges the upper portions 106' and 108' to move away from each other which causes the protrusions 136' and 138' to move towards each other. Thus, the heavier the fish, the greater the gripping force applied to the fish lip or jaw by the protrusions 136' and 138'. The upward angled protrusions 136' and 138' form a reverse taper that can positively clamp the fish's lip. The fish can be positioned relative to the clip 100' such that the gripping portions 126' and 128' grab the fish just below the fat portion of the fish's lip. The ledge 120 prevents the biasing member 116' from coming loose when an upward force is applied to the rope 204. A protrusion 130' can be used as a lip stop to prevent the

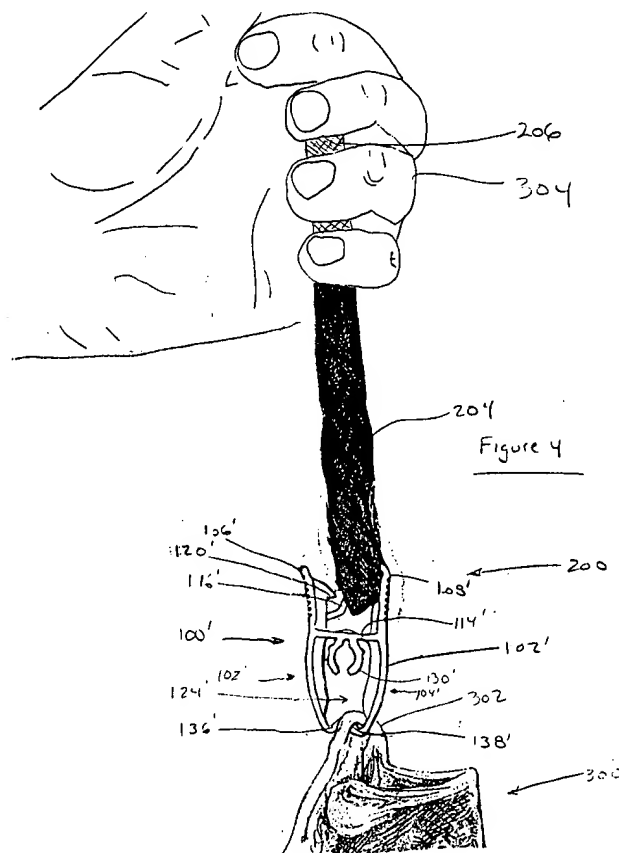
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fish from being inserted too far into the clip 100'. (Specification, page 5, lines 5-20).

After a fisherman catches a fish he wants to keep, he simply squeezes the upper portions 106' and 108' of the clip 100' with his fingers, inserts the fish's mouth in the opening 124', and then releases the upper portions 106' and 108'. The fisherman can then put the fish 300 and the assembly 200 into the live well. The fish is free to swim around the live well. The end 206 of the rope 204 floats on the top of the water. When the fisherman wants to remove a fish from the live well, all he has to do is grab the end of the rope floating on top of the water in the live well.

(Specification, page 5, line 21 - page 6, line 5).



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ISSUE PRESENTED ON APPEAL

Whether claims 1, 2, 4, 5, 7, 8, 10-13, 15-17, and 19-22 are unpatentable under 35 U.S.C. §103(a) over Johnson (U.S. Patent 6,044,582) in view of Appellant's Admitted Prior Art (APA).

THE FINAL ACTION

In finally rejecting the claims on Appeal, the Examiner states the following:

Johnson discloses a length of rope (12) having a loop formed at a first end (seen in figure 3) securing the rope to a clip (32). However, Johnson does not positively disclose the clip design with the exception that the clip is held by the lower end portion loop of the rope and that it be adapted for releasably holding a fish. Admission discloses a molded plastic clip having first and second arms (attached to first and second protrusions) /elongated rigid members/first and second members (136, 138) rotatable/pivotable about a spacer (114), the first and second arms/elongated rigid members/first and second members moveable between a first position and a second position, the first and second arms/rigid members/first and second members urged towards one another by a biasing member (116) with a gripping force at the gripping portion (126, 128) capable of holding a fish by a lip without punching a hole in the fish and a ledge (120) spaced from the spacer for restricting movement of the biasing member and further including a third protrusion (130A) extending from the spacer. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the clipping device as taught by Admission as the clip disclosed by Johnson as a matter of design choice since the clipping device as taught by Admission includes a base part capable of being held within the lower end portion of the rope (area located beneath Biasing Member 116) and having a hook part adapted for releasably holding an item (i.e. a fish) as required by Johnson. As any clip is designed for the purpose of holding an item, a clip of any particular design has the same functional equivalency and it is therefore within the skill of an artisan to determine the most appropriate clip capable for use in any given situation. Reference is noted to Yaman JP 0369846 (cited in the prior action) in which a single clip design falls within the scope of utilization for drying clothes, fruits and fish. It is therefore considered to be well known in the art that clips used for

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hanging clothes (such as that disclosed by Admission) are also known to be capable for use in hanging fish.

GROUPING OF CLAIMS

Claims 1, 2, 4, 5, 7, 8, 10-13, 15-17, and 19-22 are grouped together as containing the same essential patentable limitations. Thus, these claims stand or fall together.

THE REFERENCES

Johnson, US Patent 6,044,582 ("Johnson"):

Johnson teaches a floating marker assembly comprising a floating rope assembly, one end of which floats on the surface of the water while the other end extends downward within the water to hold a hook on which a fish may be attached. Johnson's hook is a metal safety pin type hook assembly commonly found on fish stringers, i.e. and intended to attach to a fish through the fish's gill or by punching a hole through a fish's mouth.

Applicant's Admitted Prior Art ("APA"):

The APA teaches a garment clip used to secure an item, such as a pair of pants, to a clothes hanger. The APA garment clip includes a flexible opening 132 used to connect the clip to the hanger 150.

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ARGUMENT ON APPEAL

**The Rejection of Claims 1, 2, 4-5, 7, 8, 10-13, 15-17 and 19-22 under
35 U.S.C. § 103(a) as Unpatentable over Johnson in View of APA Is
Improper because the Examiner's Rejection Is Based on Hindsight.**

In rejecting the claims, the Examiner acknowledges the Johnson clip is quite different from Appellant's claimed invention, but the Examiner takes the position it would be obvious to use the APA's garment clip in place of the clip taught by Johnson. However, this logic employs hindsight reasoning.

In establishing a *prima facie* case of obviousness under 35 USC 103, it is incumbent upon the Examiner to provide a "clear and particular" showing of "actual evidence" of a suggestion, teaching, or motivation to combine references. In re Dembiczak, 50 USPQ 2d, 1614, 1617 (Fed. Cir. 1999). "Broad conclusory statements regarding the teachings of multiple references, standing alone, are not evidence." Id., citing McElmury v. Arkansas Power and Light Co., 995 F.2d 1576, 1578, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993) (internal quotations omitted).

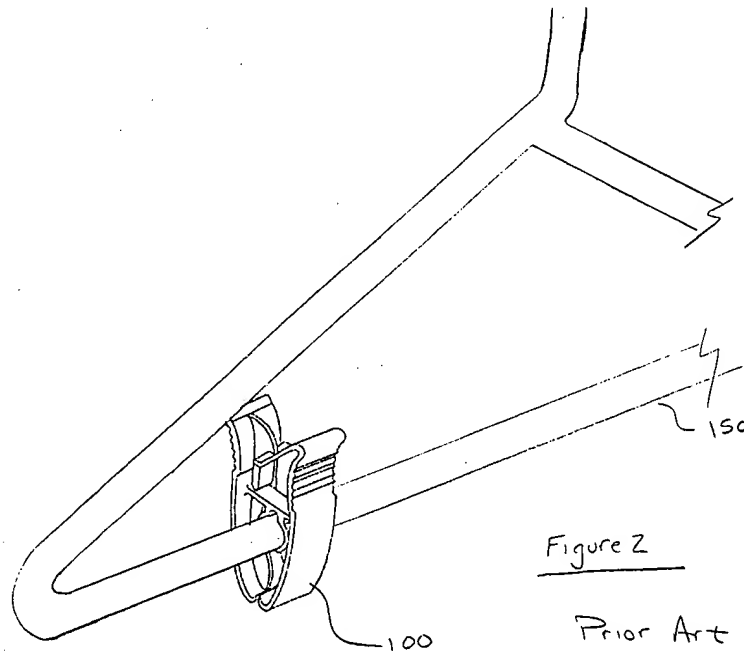
In fact, in In re Dembiczak, the Court of Appeals for the Federal Circuit recognized that "rigorous application" of the requirement for a showing of a teaching or motivation to combine references is the "best defense against the subtle but powerful attraction" of improper hindsight-based obvious analysis. Id.; see also, Para-Ordnance Manufacturing, Inc. v. SGS Importers International, Inc., 73 F.3d 1085, 37 USPQ2d 1237 (Fed. Cir. 1995) ("obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor"). This is especially true in cases where the ease with which the invention may be understood "may prompt one to fall victim to the insidious effect of hindsight syndrome wherein that which only the

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inventor taught is used against its teacher.” Id. citing W.L. Gore & Assoc., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983).

Turning to the facts of the instant case, the clip taught in APA is a garment hanger.¹ The flexible opening 132 snaps into a hanger to connect the garment clip to the hanger, as shown in Figure 2 below.



A pair of these garment clips is used to secure items, such as a pair of pants, to a clothes hanger. It would not be obvious to one skilled in the art of fishing to use this garment clip as a fishing culling tool. The culling system as described in Appellant’s independent claim 1 requires that the rope is secured to the clip and is “capable of exerting a force on the biasing member thereby increasing the gripping force.” Independent claims 12 and 21 contain similar language. Johnson

¹ The APA was invented by the instant Appellant, and sold for use as a garment hanger by the Appellant’s company for many years.

does not teach this feature, and neither does the APA; the Examiner is deducing obviousness based solely on hindsight reasoning.

The Examiner contends that "it is not outside the realm of obviousness for the APA clip ... to be used in conjunction with a rope as it is known to use clips in conjuncture with a rope for culling fish" (Detailed Action mailed October 10, 2003, cipher 1). The use of the language of "not outside the realm of obviousness" by the Examiner demonstrates her lack of certainty and confidence in her assertion of obviousness. Moreover, as discussed above, the garment clip was not just any clip. It was designed and sold for the specific and single purpose of clipping on a clothes hanger for securing items to the clothes hanger; therefore, it would not be obvious to employ the garment clip for culling fish.

At best, the garment clip taught by the APA is accidental anticipation. Accidental results, not intended and not appreciated, do not constitute anticipation. Eibel Process Co. v. Minn. & Ont. Paper Co., 261 U.S. 45, 66, 67 L. Ed. 523, 43 S. Ct. 322 (1923); Tilghman v. Proctor, 102 U.S. 707, 711 (1880). According to Tilghman and its progeny, an anticipatory inherent feature or result must be (1) consistent, (2) necessary, and (3) inevitable, not merely possible or probable. Id. In this case, the APA garment clip could not be used as a culling clip and apply the increasing force without the addition of a rope, something neither taught nor suggested by the APA.

When the garment clip is used in its original intended purpose, the benefits of this clip as a culling system are not apparent, appreciated or intended. Attaching a rope to the garment clip would interfere with its use and provide no benefit. Even if a rope were attached, the ability of

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the rope to increase the gripping force of the garment clip would not be obvious. The weight of clothes hung on the garment clip would be borne by the hanger, not the rope, and therefore any possible additional gripping force would go unheeded. Additionally, it would not be obvious that the protrusion 130, which is attached to the clothes hanger, could be used to prevent the fish from being inserted too far into the garment clip. Therefore, the advantages of this culling system are not consistent, necessary or inevitable from the garment clip.

Any anticipation of the use of the garment clip in a fish culling system is clearly accidental. Thus, the Examiner must have applied hindsight reasoning in combining the APA and Johnson. Appellant's independent claims 1, 12 and 21, and the several claims dependent thereon, are not obvious.

CONCLUSION

In view of the foregoing, it is respectfully requested that the Examiner's Rejection of the subject Application be reversed in all respects.

Respectfully submitted,

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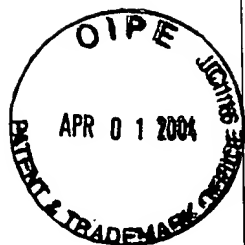
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APPENDIX A

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APPENDIX A

CLAIMS ON APPEAL

Claim 1. An apparatus for holding a fish, comprising:

a molded plastic clip having first and second arms coupled to and rotatable about a spacer, the first and second arms having first and second protrusions respectively adjacent their distal ends moveable between a first position and a second position, the distal ends of the first and second arms being urged towards one another by a biasing member to create a gripping force between the first and second protrusions, in the first position, the gripping force capable of holding a fish by a lip without punching a hole in the fish, a third protrusion extending from the spacer for preventing a fish from being inserted too far onto the clip, and a ledge spaced from the spacer for restricting movement of the biasing member; and

a length of rope having a loop formed at a first end, the loop securing the rope to the clip, the loop capable of exerting a force on the biasing member thereby increasing the gripping force.

Claim 2. The apparatus of claim 1, wherein the first, second and third protrusions, the first and second arms and the biasing member are molded as one piece.

Claim 4. The apparatus of claim 1, wherein the rope is a braided hollow polypropylene.

Claim 5. The apparatus of claim 4, wherein the loop is formed by inserting the first end of the rope inside the hollow rope a spaced distance from the first end.

Claim 7. The apparatus of claim 1, wherein the rope comprises a second end, the second end forming a loop to assist in holding the rope.

Claim 8. The apparatus of claim 1, wherein the rope comprises a second end, the second end comprising a marker for indicating the weight of an attached fish.

Claim 10. The apparatus of claim 1, wherein the first and second protrusions are angled towards the biasing member.

Claim 11. The apparatus of claim 1, wherein the first and second protrusions further comprise a plurality of grooves to assist in the holding of the fish.

Claim 12. An apparatus for holding a fish, comprising:

a clip formed of two or more molded plastic elongated rigid members, the rigid members having a first end and a second end, the rigid members each having a gripping portion at the first end for holding a fish by a lip without punching a hole in the fish, the rigid members rotatable about a spacer located between the first ends and the second ends, a biasing member coupled to the rigid members urging the second ends to move away from one another and the first ends to move towards one another, a protrusion extending from the spacer for preventing a fish from being inserted too far onto the clip, and a ledge spaced from the spacer for restricting movement of the biasing member; and

a length of rope coupled to the biasing member, the rope capable of exerting a force on the biasing member further urging the second ends of the rigid members to move away from one another.

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Claim 13. The apparatus of claim 12, wherein the rigid members, the spacer, and the biasing member are molded as one piece.

Claim 15. The apparatus of claim 12, wherein the rope is a braided hollow polypropylene.

Claim 16. The apparatus of claim 15, wherein the rope has a loop formed at a first end of the rope, the loop coupling the rope to the clip.

Claim 17. The apparatus of claim 16, wherein the loop is formed by inserting the first end of the rope inside the hollow rope a spaced distance from the first end.

Claim 19. The apparatus of claim 12, wherein the rope comprises a second end, the second end forming a loop to assist in holding the rope.

Claim 20. The apparatus of claim 12, wherein the rope is adapted to float on the surface of water.

Claim 21. An apparatus for holding a fish, comprising:

a molded plastic clip having a first member and a second member coupled to and pivotal about a spacer, a first protrusion disposed at a first end of the first member and a second protrusion disposed at a first end of the second member, the first and second protrusions extending towards each other and angled towards the spacer, the first and second protrusions being moveable between a first position and a second position, a biasing member spaced from the spacer, the biasing member having a first end coupled to a second end of the first member and a second end in sliding contact with the second member, the biasing member causing the first and second protrusions to move towards each other to create a gripping force between the

first and second protrusions capable of holding a fish by a lip without punching a hole in the fish;

a third protrusion extending from the spacer for preventing a fish from being inserted too far onto the clip; and

a length of rope having a loop formed at a first end, the loop securing the rope to the clip, the loop capable of exerting a force on the biasing member thereby increasing the gripping force.

Claim 22. The apparatus for holding a fish of claim 21, wherein the first and second protrusions have a plurality of grooves to assist in the gripping of the fish.

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